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Water Docket

U.S. Environmental Protection Agency

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Washington, DC 20460

**Re: NAHB Comments on the proposed Chesapeake Bay TMDL
Docket ID No. EPA-R03-OW-2010-0736**

This document contains the comments of the National Association of Home Builders (NAHB) on the U.S. Environmental Protection Agency's (EPA) proposed Total Maximum Daily Load (TMDL) for the Chesapeake Bay, the availability of which was announced in the Federal Register on Sept. 22, 2010. Our comments are supplied in the spirit of addressing the challenges in this proposed regulatory program.

NAHB is a trade association representing more than 175,000 members involved in home building, remodeling, multifamily construction, property management, subcontracting, design, housing finance, building product manufacturing and other aspects of residential and light commercial construction. Known as "the voice of the housing industry," NAHB is affiliated with over 800 state and local home builders associations around the country. NAHB's builder members will construct about 80 percent of the new housing projected for 2010. Because of the nature of their work, most of our builder members must obtain and operate pursuant to National Pollutant Discharge Elimination System (NPDES) permits for controlling the stormwater discharges from their construction sites. The Chesapeake Bay TMDL's requirements will become a part of the stormwater permits issued for homebuilding projects in the Bay watershed.

Throughout the development of the TMDL, NAHB and its affiliated home building associations and members operating within the watershed have consistently voiced

interest in restoring the Bay using cost-effective, balanced, and sustainable solutions that facilitate economic growth and preserve the ability of a growing population to live, work, and play in the watershed. To reach this reasonable, responsible, and realistic restoration plan, we believe the agencies must develop and adopt TMDL and implementation plans that allow for and invite broad public participation; is based on defensible modeling and data; is cost-effective and affordable; is understandable; is fair and equitable; and is flexible and invites innovation. The proposed TMDL, however, fails to meet these objectives.

Before EPA establishes any regulatory requirements that may significantly impact state and local governments, federal law requires a number of prescribed steps. EPA, however, has failed to fully adhere to this mandate, as it has proposed an overly-burdensome rule, failed to engage affected jurisdictions, and underestimated the burdens on state and local governments. EPA must correct these deficiencies prior to adopting a final rule.

The Unfunded Mandates Reform Act of 1995 (UMRA) directs agencies "unless otherwise prohibited by law [to] assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector..."¹ Section 202(a)(2) of the act directs agencies to provide a qualitative and quantitative assessment of the anticipated costs and benefits of a federal mandate resulting in annual expenditures of \$100 million or more -- including the costs and benefits to state, local, and tribal governments or the private sector.² Sections 203 and 204 also require EPA to develop a plan to notify potentially affected small governments, thus enabling them to provide meaningful and timely input on EPA's regulatory proposals having significant federal mandates.³ This allows affected small governments to develop an effective process for elected state, local, and tribal government officers to likewise provide meaningful and timely input.⁴ EPA has failed to follow any of these steps. While the proposal's Appendix C lists numerous meetings that have been held on the Chesapeake Bay efforts, none were specific to discussing the impact of the TMDL on state and local entities. Furthermore, meetings in Appendix C date back to 2005. Meetings held years ago cannot be held forth as substitutes for timely input by affected small businesses in 2010.

The docket confirms these inadequacies, as it contains no mention of a Section 203 plan and provides no indication that any notification has taken place. Given that the proposal will cost federal, state and local governments billions of dollars, the failure to properly notify and solicit input from these affected entities is unacceptable. **EPA is strongly urged to immediately inform all affected government entities and provide them with sufficient information and time to fully understand the proposal and its**

¹ 2.U.S.C. § 1531.

² *Id.* at § 1532(a)(2).

³ *Id.* at §§ 1533, 1534.

⁴ *Id.* at § 1534(a).

implications, to develop estimates of the costs associated with administration and compliance, and to prepare and submit meaningful comments.

While EPA may have a legal obligation to develop a TMDL for the Bay, neither the court directive nor the Clean Water Act (CWA) negates the need to comply with the procedural rules set out by the UMRA or the need to adopt a rule that can be effectively implemented. EPA must correct these deficiencies and provide an opportunity for the public to review and critique its data prior to rule adoption.

In addition, NAHB is concerned that EPA's proposal is not only another unfunded federal mandate, but also takes over some of the decision-making that has always been the prerogative of the states. For example, the "Independent Evaluator," which we assume that EPA has hired even though it is not discussed in the proposal, will punish any state that does not raise sufficient funds to meet its goals for the proposed rule. This means that other state needs such as functioning schools, fire protection, police protection, road repair, reliable infrastructure or feeding the poor will likely suffer the effects. At a time when the states have been laying off employees, they must now redirect their scarce resources from safety, education, and infrastructure to hire new people to ensure that the state meets the TMDL requirements. The real risk is that a state may seek to avoid punishment by eventually taking funds from one of its other critical needs to meet the TMDL requirements, which are expensive, will require extensive documentation by the state, and will continue into perpetuity.

Another troubling requirement is that the TMDL will drive the "acceptable" growth rate for communities within the watershed. New growth will need to offset its pollutant contributions by drawing from an existing pollutant allocation if the state has set aside such an allocation in its Watershed Implementation Plan (WIP), or new growth activities must purchase water quality credits. Right now, if a state has no "growth allocation" set aside in its WIP, no adequate program exists to allow new projects to purchase water quality credits. Even if such a program did exist, it not only adds a new cost, it also becomes the determining factor for all new growth considerations in the area of the state covered by the TMDL.

These and other requirements will limit the affected state's ability to spend taxpayer dollars to the best advantage of its citizens. Yet these are the requirements that EPA wants other areas of the country to duplicate. As we have pointed out in previous comments, it is inappropriate for EPA to hold out the Chesapeake Bay TMDL as a model program for other water quality improvement programs to duplicate.

I. EPA Has Wrongfully and Unfairly Truncated the Rulemaking Process.

EPA and the states must follow a reasonable process to develop and finalize the TMDL and its implementation plans. A reasonable process is one that provides broad and meaningful opportunities for public input both during program development and implementation. Unfortunately, EPA has demonstrated that it has lost interest in receiving meaningful stakeholder input on its proposals. While still going through the motions of listening to stakeholder concerns, the agency has reduced the opportunities for stakeholders to comment on the agency's actions by creating increasingly short public comment periods on large, complicated, thousand-page proposals that do not allow stakeholders to study the proposals or develop meaningful input. In fact, many of the agency's new regulatory requirements are dressed up as "guidance" for MS4s, which effectively negates any opportunity for input at all. In addition to providing insufficient time for review, the agency is contemplating finalizing the rule using invalid modeling. Neither approach is appropriate or acceptable.

a. Inadequate Time has been Provided for Review and Comment.

The Chesapeake Bay TMDL is a very complex, innovative and far-reaching new rule. Because of the impact the TMDL will have on the home building industry, communities, and the overall region, it is imperative that it be finalized only after all parties are provided sufficient opportunity to give careful thought and consideration to all aspects of the proposal and its supporting documents. EPA's efforts to accelerate the TMDL's completion by cutting a most important element in the development of the Bay restoration program – the public review and comment period – is misguided and wrong. We strongly urge the agency to provide the public more, not less time.

Under the Administrative Procedure Act (APA), a "[g]eneral notice of proposed rulemaking shall be published in the Federal Register" and the agency must "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments."⁵ "The opportunity to comment must be a meaningful opportunity."⁶ "Section 553 is designed to ensure that affected parties have an opportunity to participate in and influence agency

⁵ 5 U.S.C. §§ 553(b) & (c).

⁶ *Rural Cellular Ass'n v. Federal Commc'ns Comm'n*, 588 F.3d 1095, 1101 (D.C. Cir. 2009); *Gerber v. Norton*, 294 F.3d 173 (D.C. Cir. 2002).

decision making at an early stage, when the agency is more likely to give real consideration to alternative ideas.”⁷

The proposed Chesapeake Bay TMDL is a combination of 92 smaller TMDLs for individual tidal segments. It consists of 333 pages of main text and includes 22 appendices, some of which contain hundreds of pages of data. Furthermore, the Chesapeake Bay watershed touches six states and the District of Columbia and encompasses 64,000 square miles of land. Yet, the agency has provided the public with only 45 days to provide comments on its proposal and plans to finalize the TMDL by the end of December 2010. The 45-day time period does not allow the public to review all 92 “sub-TMDLs,” or analyze the data and provide comments to allow the agency to make a better informed decision.

Furthermore, the TMDL is just one of several restoration actions under way. Amid the implementation of the directives of the Chesapeake Bay Executive Order 13508, the state WIPs, and newly proposed or revised MS4 programs, EPA has proposed a TMDL with an unprecedented broad scope. In addition, the agency has recently scheduled a series of “listening sessions” during the TMDL comment period to discuss new Chesapeake Bay-specific portions of the national post-construction stormwater rule the agency is developing. EPA plans for that rule to have Chesapeake Bay-specific requirements that will come *on top* of the TMDL requirements. These similar, overlapping, but entirely different rules and their public meetings are confusing even to those intimately familiar with the national stormwater regulatory structure. Those most able to comment on the proposed TMDL and the post-construction rule are already occupied with analyzing and commenting on their revised state Phase I WIP.

Recognizing these challenges, on Oct. 15, 2010, NAHB submitted to the Chesapeake Bay TMDL docket, EPA-R03-OW-2010-0736, a request for extending the public comment period for the proposed TMDL by another 180 days and provided a detailed explanation of the reasons NAHB said that the request was prudent and necessary (see attachment A). Others filed similar requests, including twenty-one members of Congress. On Oct. 22, EPA responded to Congressman Goodlatte, stating “it is not feasible to extend the public comment period on the draft Chesapeake Bay TMDL past November 8,

⁷ *Dismas Charities, Inc. v. U.S. Dept. of Justice*, 401 F.3d 678 (6th Cir. 2005) (quoting *U.S. Steel Corp. v. EPA*, 595 F.2d 207, 214 (5th Cir.1979)).

2010 and therefore delay finalization of the TMDL by December 31, 2010.”⁸ Reasons cited in the letter include an agreement that was made in June, 2008, negotiations between the states and EPA, a commitment included in the Executive Order 13508 Final Strategy and the settlement agreement between EPA and the Chesapeake Bay Foundation.

Importantly, contrary to EPA’s contention, none of these agreements are legally-binding or unchangeable. Agreements can be renegotiated and commitments can be revised, and because the current deadline is simply an agreed-to date within a court settlement, EPA can renegotiate.⁹ In fact, the Settlement Agreement gives EPA flexibility to extend the Dec. 31 deadline and certainly does not limit or modify EPA’s discretion to allow the public sufficient time to review and comment on the 92 Bay TMDLs.¹⁰

NAHB stands by its earlier request to extend the public comment period and reiterates the negative impacts that will accrue by foregoing such a vital part of the rulemaking process. EPA owes the Chesapeake Bay communities, citizens, and stakeholders more than 45 days to analyze and comment on a proposed rule that will have a major impact on the lives of all people living and working in the Chesapeake Bay watershed. Likewise, as EPA intends for this TMDL to serve as a precedent for the nation, the public must be afforded sufficient time to review, understand, and provide meaningful comment. Finally, NAHB is extremely concerned that the time frame between the end of the comment period and Dec. 31 is not long enough for the agency to truly consider alternative ideas that may be provided by the public.

It is EPA’s responsibility to schedule its regulatory activities to ensure that the public has sufficient opportunities for participation and sufficient time for review and comment. Likewise, the agency must give itself sufficient time to meet its rulemaking obligations. The agency has failed in both regards, with the many, overlapping, and confusing Bay-related regulatory proposals that it has issued in the latter part of 2010. **EPA is urged to:**

⁸ Arvin Ganesan, Deputy Associate Administrator for Congressional Affairs, U.S. Environmental Protection Agency, letter to Congressman Bob Goodlatte, October 22, 2010.

⁹ *Fowler v. EPA Settlement Agreement*, Section IV.A. (“[t]he parties may modify any deadline or other term of this agreement in writing.”).

¹⁰ *Fowler v. EPA Settlement Agreement*, Sections VI.A, D, & E. (noting that the agreement does not limit or modify EPA’s discretion under the APA or require EPA to violate the APA, and allowing EPA to delay deadlines under certain circumstances upon notice to the plaintiffs).

1. **Extend the comment period for the proposed TMDL to allow adequate stakeholder input to the process,**
 2. **Provide access to the background modeling and technical decisions and assumptions that EPA has made regarding the proposal (see comment II below for more on this suggestion), and**
 3. **Fully consider and act on the input it receives.**
- b. **Finalizing the TMDL Prior to Finalizing the Modeling Makes No Sense.**
EPA's stated plan is to produce a final TMDL by the end of 2010. To meet this deadline, the affected states must submit their final Phase I WIPs by Nov. 29 to EPA, which then approve or modify the state WIPs with backstop allocations as it thinks best. EPA, however, admits that the latest updates to the computer modeling, which were used to set the pollutant loading targets for both the TMDL and the WIPs, have proven to be unreliable. Therefore, the pollutant loadings that will be part of the "final" TMDL approved by Dec. 31 are to be considered "provisional." If necessary, after fixing the computer modeling, EPA will reopen the TMDL in 2011 to finalize the state loadings allocations for pollutants.

Any TMDL, especially one which will have such a significant impact on the states covered by the rule, should never be allowed to become final when it is known to have deficiencies. EPA's cavalier attitude about the costs and impacts of a rule known to be defective from the beginning does not do credit to the agency. **NAHB urges EPA to fix the modeling and publish it for public review and comment *before* finalizing the TMDL.**

II. EPA's TMDL Authority is Limited

EPA claims broad CWA authority as the basis for its development of the Chesapeake Bay TMDL. Contrary to this assertion, NAHB contends EPA is overstepping its authority to develop and direct the implementation of the comprehensive TMDL and to require, approve, or modify state WIPs.

a. States Retain Primary Authority To Develop TMDLs.

Under Section 303(d) of the CWA, states are responsible for developing TMDLs for all impaired waters. The TMDLs are to be set at levels that will allow the waters to meet applicable water quality standards. EPA is required to review and approve or disapprove the TMDLs and to establish TMDLs if a state fails to do so.¹¹ However, EPA goes too far in its present actions that override the state responsibility to meet

¹¹ 33 U.S.C. § 1313(d).

the TMDL's requirements in the best fashion for the state. EPA has overstepped its authority in assigning "backstop allocations" to the state WIPs while providing no justification for the need to do so, or justification for the very stringent requirements of the backstop allocations. **EPA should judge the actions of the state against the requirements of the TMDL, not assume authority for developing "sufficient" WIPs for the states.**

b. The CWA Does Not Confer Implementation Authority To EPA.

Section 303(d) of the CWA does not specifically require implementation plans for TMDLs.¹² Recognizing this, in 2000, EPA attempted to enact a new requirement by issuing regulations that would have required each TMDL to include an implementation plan.¹³ Congress subsequently blocked implementation of those regulations however, and eventually EPA withdrew them.¹⁴ As a result, implementation plans, including their approval or disapproval, remain outside the bounds of the TMDL and outside the authorities of EPA. As the Ninth Circuit noted, "States must implement TMDLs only to the extent that they seek to avoid losing federal grant money; there is no pertinent statutory provision otherwise requiring implementation of §303 plans or providing for their enforcement."¹⁵

Under the proposed TMDL, the WIPs ultimately serve as the TMDL implementation plans for each state. Despite the directives above and EPA's admission that, "The WIPs are part of the accountability framework meant to implement the Chesapeake Bay TMDL, but they are not part of the TMDL itself,"¹⁶ the agency insists it has authority over their approval and disapproval. This interpretation is overly broad and inconsistent with the statute. In an attempt to further skirt the issue, EPA points to Section 117(g) of the CWA¹⁷ and Executive Order 13508¹⁸ as ways to claim jurisdiction. Neither passes muster. First, when it enacted the Chesapeake Bay Restoration Act of 2000 and Section 117(g), Congress never intended to create any new regulatory powers. The legislative history reads,

"(g) Chesapeake Bay Program.—

¹² U.S. Environmental Protection Agency, Overview of Impaired Waters and Total Maximum Daily Loads Program, accessed at <http://www.epa.gov/owow/TMDL/overviewoftmdl.html>, on November 2, 2010.

¹³ 65 Federal Register 43,586 (July 13, 2000).

¹⁴ See P.L. 106-246 and 68 Federal Register 13,607 (March 19, 2003).

¹⁵ *Pronsolino v. Nastri*, 291 F.3d 1123, 1140 (9th Cir. 2002).

¹⁶ Draft TMDL, at 1-2.

¹⁷ See Draft TMDL, at 1-12 ("The accountability framework is also being established pursuant to CWA section 117(g)(1)"). Specifically, EPA is relying on language in section 117(g) that states that "the Administrator, in coordination with other members of the Chesapeake Executive Council, shall ensure that management plans are developed and implementation is begun by signatories to the Chesapeake Bay Agreement...."

¹⁸ Draft TMDL at 1-12.

(1) Management Strategies.—Directs EPA, in coordination with other members of the Council, to ensure that management plans are developed and implementation is begun by signatories to the Chesapeake Bay Agreement to achieve the goals of that Agreement. The Committee expects EPA to meet the requirements of this paragraph through the award of implementation grants under subsection (e). *Nothing in the Chesapeake Bay Restoration Act provides EPA with any additional regulatory authorities.*¹⁹

Clearly, Congress did not grant EPA any new authority under CWA Section 117(g) to approve, disapprove, or change state TMDL implementation plans or WIPs.

Second, EPA points to the language in the Executive Order that “directs EPA and other federal agencies to build a new accountability framework that guides local, state, and federal water quality restoration efforts.”²⁰ Because the Executive Branch lacks the authority to create new obligations and only has the power to implement the laws passed by Congress, an Executive Order cannot be used to supersede the authorities granted by law. As such, EO 13508 cannot be construed to direct or allow EPA to maintain authorization oversight of the state WIPs.

Finally, because it lacks authority over the WIPs, EPA cannot require states to include specific requirements within those implementation plans or threaten action if they don’t. Indeed, nothing in the CWA or EPA regulations gives EPA the authority to compel state regulatory action. EPA, however, has taken a different tack. In addition to claiming authority over WIP approval and disapproval, EPA has outlined various actions that it could take against states whose WIPs are deemed unsatisfactory. The CWA is clear that, once authorized, states are responsible for implementing the various water quality programs outlined in the CWA. While EPA may provide guidance for how these programs may be administered, it cannot dictate how they will run or specify how water quality standards are to be met. Instead, if EPA does not believe that a state is properly administering a CWA program, the CWA allows the agency to withdraw that state’s authority. Period. EPA retains no authority to limit funding, withhold permits, reallocate pollutant loads, or increase enforcement if it disagrees with a state WIP. EPA is strongly urged to reassess its duties pursuant to the TMDL and rely on only those conferred via the CWA.

III. The TMDL Lacks Sufficient Technical Support.

¹⁹ H.R. Rept. No. 550, 106th Cong., 2d Sess., at 3 (2000) (emphasis added).

²⁰ Draft TMDL at 1-12.

The TMDL and its implementation plans must be supported by data and modeling that is credible, reproducible, and transparent. Much of the supporting data, however, has either not been made available or is otherwise so technically complex and complicated that review in such a short period of time is impossible.

a. The Processes and Assumptions Within the TMDL are Not Transparent.

The computer modeling that forms the basis of the proposed Chesapeake Bay TMDL is exceedingly complex and expensive and is also unique, making it unlikely that similar computer models could be duplicated for other watersheds anywhere else soon. EPA has described the modeling development in Section 6 of the proposal, including how the state and watershed pollutant loadings were developed. However, many of the supporting documents are not available in the docket.²¹ These include the documents that explain EPA's assumptions about such modeled characteristics as land use within the watershed, the amount and growth of impervious pavement surfaces, Best Management Practices (BMPs) in place in the Bay states, the "acceptable" BMPs that states may use to meet the TMDL, etc.

Therefore, the basic assumptions of the modeling, the available technologies to reduce the regulated pollutants, population growth estimates, the data sources for EPA's estimates of the deposition of pollutants from airborne emissions, etc. are not available for review by the public. How can EPA claim to have developed a legitimate program if the proposal lacks documentation explaining what method it used for measuring expected pollutant load reductions associated with the TMDL or reliable data on the number of active construction sites, the regulated universe, or the performance effectiveness of "acceptable" BMPs?

The APA²² compels EPA to engage in reasoned decision-making, which requires EPA to affirm that all factors relevant to the decision have been considered. Contrary to this directive, EPA has failed to provide any supporting documentation to demonstrate that such a study has been conducted. As a result, the public has no assurance that the agency has properly calculated the loadings, benefits, costs, and other relevant and important elements that necessarily must provide the foundation for rulemaking. Absent an administrative record that adequately supports the proposal, the public is unable to knowledgeably comment

²¹ At the time of writing these comments, the docket for the proposal, EPA-R03-OW-2010-0736, contains only the proposal itself, various appendices, and public comments to request an extension of the comment period or other short public comments on the proposal.

²² 5 U.S.C. § 501 *et seq.*

on, and participate in, the rulemaking process proposed here. NAHB believes that the sheer volume of supporting documentation, the inconsistencies among documents, the lack of actual urban runoff or construction site data, and the failure to provide a clear picture of the implementation expectations makes it very difficult for the public to understand the impact of the proposed TMDL. Further, we believe that there is insufficient data to support the proposal. As courts have recognized, meaningful comment on proposed rules can be precluded by the failure of agencies to disclose especially relevant information.²³ It is contrary to the purpose of the APA's requirements to promulgate rules based on inadequate data or data that are known only to the agency.²⁴

EPA has failed to provide any supporting documentation to demonstrate that such a study has been conducted. As a result, the public has no assurance that the agency has properly calculated the loadings, benefits, costs, and other relevant and important elements that necessarily must provide the foundation for rulemaking. Absent an administrative record that adequately supports the proposal, the public is unable to knowledgeably comment on, and participate in, the rulemaking process.

NAHB believes that the sheer volume of supporting documentation, the inconsistencies among documents, the lack of actual urban runoff or construction site data, and the failure to provide a clear picture of the implementation expectations makes it very difficult for the public to understand the impact of the proposed TMDL. Further, we believe that there is insufficient data to support the proposal. As courts have recognized, meaningful comment on proposed rules can be precluded by the failure of agencies to disclose especially relevant information. It is not consonant with the purpose of a rulemaking proceeding to promulgate rules on the basis of inadequate data or data that is known only to the agency.²⁵ Finally, EPA's failure to make adequate information about this important model

²³ See e.g. *Gerber v. Norton*, 294 F.3d at 179 (holding that the agency did not provide a meaningful opportunity for public comment where it failed to make key information available for comment).

²⁴ See e.g. *id*; *Engine Mfrs. Ass'n v. EPA*, 20 F.3d 1177, 1181 (D.C. Cir. 1994) (the APA "requires the agency to make available to the public, in a form that allows for meaningful comment, the data the agency used to develop the proposed rule"); *Connecticut Light & Power Co. v. Nuclear Regulatory Comm'n*, 673 F.2d 525, 530-31 (D.C. Cir. 1982) ("To allow an agency to play hunt the peanut with technical information, hiding or disguising the information that it employs, is to condone a practice in which the agency treats what should be a genuine interchange as mere bureaucratic sport. An agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary."); *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 393 (D.C. Cir. 1973) ("It is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of inadequate data, or on data that, critical degree, is known only to the agency.")

²⁵ *Portland Cement Assn. v. Ruckelshaus*, 486 F.2d 375, 393 (D.C. Cir. 1973) cert.denied, 417 U.S. 921 (1974).

available for public review is not only a violation of the APA, as discussed above, it is a violation of 40 C.F.R. 130.7(c)(1)(ii), which requires that calculations used to establish TMDLs be subject to public review.

NAHB strongly urges EPA to set up a public website dedicated to the modeling effort done for the Chesapeake Bay TMDL, post all past and new documents related to the modeling effort, and allow the public time to review and comment on all decisions regarding the modeling. This is especially important in light of the fact that the latest update of the Watershed model is known by EPA to be deficient and may require that EPA reopen the TMDL in 2011 to revise the TMDL's goals for pollutant loadings.

b. No Data is Provided to Demonstrate that the “Backstop Allocations” are Necessary or Achievable in Practice

After receiving the state WIPs in the beginning of September and with very little time for review, EPA very quickly deemed all of them inadequate in some way or another. EPA then determined how to make up the shortfall in a state's “insufficient” pollution loading reductions and/or insufficient amount of reasonable assurance for the remainder of the allocation. EPA then applied these various “backstop allocations” to the state WIPs. The agency, however, provides no details for how it determined the adequacy of the WIPs or how the need for, or level of, backstop allocations was established.

EPA's “moderate” backstop allocations for urban stormwater in the WIPs for Delaware, New York, Pennsylvania, Virginia and West Virginia, for example, are shown on pages 8-14 and 8-15 of the proposal. The performance standards in the backstop allocations have surely never been met before by an MS4 anywhere in the country, yet EPA provides no support for its statement that the backstop allocations for urban stormwater programs are necessary or achievable, not to mention affordable, goals for MS4s. Details regarding how and why the backstop allocations were derived and how they are expected to be attained are vital to understanding the TMDL as well as its overall impact. Likewise, the agency must provide information on expected costs of meeting the standards and the impacts of those costs on the regional economy and the affordability of housing.

Finally, the direction and intent of the backstop allocations is not always clear. NAHB understands the language on pages 8-14 and 8-15 concerning the goals of the backstop allocations for urban stormwater to mean that 50 percent of the MS4's existing impervious cover would be affected by the proposed rules. As we

understand the language, in regions with karst topography and coastal plain lowlands, for example, 50 percent of the impervious cover in the MS4 must be reduced by 50 percent using cisterns and collection systems so that a maximum of 25 percent of impervious cover will remain in the MS4 by 2025. In addition, filtering practices are required so that environmental impacts are reduced from another 15 percent of the existing impervious cover by 2025 and infiltration practices are required so that environmental impacts are reduced from another 10 percent of the existing impervious cover by 2025. Thus, by the end of 2025, the requirement allows that 50 percent of the original impervious pavement will remain unaddressed. **Does EPA concur with our understanding of the language of the backstop allocations for urban stormwater?**

c. EPA's Impervious Calculations are Problematic and Not Supported.

NAHB understands that EPA's updated Watershed model for the Chesapeake Bay has a number of suspected deficiencies. One of particular interest is the estimate of the amount of impervious surfaces in each state, which is surprisingly large in EPA's recent modeling efforts and much larger than previous estimates calculated by the previous Bay model. This issue is important to both the MS4s, whose goals for impervious pavement retrofit requirements will be determined by the final model calculations on impervious pavement, and to the home building industry that must obtain stormwater permits from the MS4 whenever conducting redevelopment projects in the MS4. In short, the MS4s are expected to require retrofits for redevelopment projects that reflect the retrofit requirements that the MS4 itself must meet.

The multi-billion dollar price tag for the proposed Chesapeake Bay MS4 retrofit requirements contained in the urban stormwater backstop allocations make it absolutely critical that EPA's impervious surface estimates be correct. This can only be assured if the estimates are transparent and reviewed by stakeholders and the public. **NAHB requests that EPA post on its website all background documents related to its impervious pavement estimates, both past estimates and the current estimate, for stakeholder review and comment.** The Chesapeake Bay states cannot allow EPA and its contractors to address the deficiencies of the existing Bay computer model without public scrutiny. Too much is at stake to leave the issue up to EPA, an agency that is adamant that the cost of its proposal is of no consequence.

IV EPA Has Failed to Provide Cost Data or Identify Funding Sources.

To be effective, the TMDL and its implementation plans must optimize costs and benefits and be designed to be implemented using available resources. To date, however, it is unclear that the proposal meets any of these goals, as EPA has included little data or information regarding how much the TMDL will cost or how its implementation will be funded. Absent this information, the public is at a loss to fully understand the overall plan or provide meaningful input. **EPA should plan now to begin a Use Attainability Analysis for the Chesapeake Bay in anticipation that the TMDL that it has proposed will prove to be unaffordable given the economic condition of the affected states and the level of the national debt.**

a. EPA Must Complete a Comprehensive Cost Analysis.

EPA's proposed TMDL will have large negative impacts on the home building industry, the home-buying public, construction industry jobs, and state and local governments because of the unprecedented requirements generated without consideration of the social costs on the affected states. While EPA is quick to point out that the agency is not legally obligated to do a cost analysis for a TMDL, anyone who has had a hint of the potential cost of the new requirements will agree that a cost analysis is deserved for those who must foot the bill in these difficult economic times. A full cost analysis is also necessary because of the number of unique factors associated with the proposed Chesapeake Bay TMDL, including:

- It is unprecedented in size and scope, as it extends over portions of six states and Washington, DC, an area of 64,000 square miles, a total of 92 watersheds, and 17 million inhabitants;
- EPA expects it to be held up as a model for similar nutrient reduction programs that will occur around the country;
- EPA is imposing an indisputably heavy hand in this proposal regarding state decision-making over land use, use of state finances, the stringency of state WIPs developed to meet the rule, and other matters that have traditionally been left to the states;
- EPA intends to hold the states, municipalities, NPDES permit holders, and citizens responsible if the states do not live up to EPA's vision of complete compliance with the proposed rule; and
- The stringency of the new pollutant reduction requirements will significantly strain the already challenged state and local government budgets and may simply be unaffordable for the states and localities covered by the rule.

Obviously, the scope and the many unique features of the proposed rule alone constitute sufficient reason to conduct a comprehensive cost/benefit analysis. When coupled with EPA's stated expectation that everyone will need to do "everything" to meet the rule's provisions, the affected parties, including states, communities, industry stakeholders, and the citizens, deserve to know what the expected level of sacrifice will be required from them. **A cost analysis must be done.**

1. Overall Impact on Small Business

The Draft TMDL for the Chesapeake Bay is contrary to law, as EPA has failed to assess the economic impacts of the rule on small entities and publish a regulatory flexibility analysis (RFA).²⁶ EPA's RFA omissions are troublesome considering the Bay TMDL will be the largest, most complex TMDL in the country, affecting hundreds of thousands of small entities. An economic analysis is particularly important in light of the severe financial difficulties facing small entities in the TMDL coverage area. In addition, EPA's actions are inconsistent with the Obama Administration's open government directive to federal agencies calling for specific actions to ensure the public trust and create a system of transparency, public participation and collaboration.²⁷ **Because EPA is planning to finalize the Bay TMDL by December 2010, EPA must conduct an RFA analysis and revise the TMDL appropriately or exclude small entities from its coverage.**

It is anticipated that EPA will allege the Bay TMDL does not impose a burden on small entities because it sets water quality limits backed by an accountability framework but leaves the states responsible for determining how to obtain the reductions, including which entities to regulate and to what extent. NAHB rejects this position. The Bay TMDL constitutes a "rule" subject to the RFA. This is so because the Bay TMDL, which sets limits on nitrogen, phosphorous and sediment throughout a 64,000-square-mile watershed and imposes two-year commitments, close monitoring and, if necessary, federal accountability measures to spur progress, is a legal prescription of general and prospective applicability issued by EPA to implement CWA water quality standards. By authorizing modification of certain discharges, the Bay TMDL imposes obligations and legal consequences that otherwise did not apply to small businesses. For example, perceived deficiencies in the majority of draft pollution reduction plans

²⁶ *Regulatory Flexibility Act of 1980, as amended*, 5 U.S.C. § 601 et seq..

²⁷ The White House, Office of the Press Secretary, *Transparency and Open Government: Memorandum for the Heads of Executive Departments and Agencies*, Jan. 21, 2009.

submitted by the Bay states and District of Columbia have led EPA to replace jurisdictions' proposed point source allocations with more stringent federal "backstop allocations" covering wastewater treatment plants, stormwater permits and animal agricultural operations.²⁸ If states fail to revise their WIPs to achieve the basin-jurisdiction allocations and provide a high level of assurance for achieving the allocations, EPA's proposed water quality standard daily load limits will take effect. Small NPDES permitted entities listed in Appendix R of the proposal, including Country View Family Farms, Armetta's Pizzeria, Inc., the Carlson Small Flow Treatment Facility and other small entities, may be held to a more stringent permitting standard as a result.²⁹

The RFA, as amended by the Small Business Regulatory Enforcement Fairness Act, imposes both analytical and procedural requirements on EPA including: (1) identifying the small entities that will be affected; (2) analyzing and understanding the economic impacts that will be imposed on those entities; and (3) considering alternative ways to achieve their regulatory goals while reducing the economic burden on those entities.³⁰ NAHB anticipates EPA will claim it is not required to engage in this process because RFA only applies to rules for which an agency publishes a notice of proposed rulemaking.³¹ As detailed above, however, the TMDL will have a direct economic impact on a significant number of small entities. It is inconsequential that EPA failed to issue a notice of proposed rulemaking pursuant to APA's rulemaking provision. A rule is a rule, no matter how it is dressed up. On Sept. 17, 2009, EPA published in the Federal Register (FR) a "Notice and Initial Request for public input" announcing its intent to establish a bay-wide TMDL.³² This was followed by a FR "Notice of Availability of the Draft TMDL and request for public review and comment on the Draft TMDL" on Sept. 22, 2010.³³ EPA is accepting public comment on the Bay TMDL and is soliciting input from the public relevant to the development of the Final Bay TMDL. Although EPA has not issued a notice of proposed

²⁸ Draft Chesapeake Bay Total Maximum Daily Load, Executive Summary, Section 1-3, p. ii (Sept. 24, 2010).

²⁹ Draft Chesapeake Bay Total Maximum Daily Load, Appendix Q-R, Table R-1 (Sept. 24, 2010).

³⁰ 5U.S.C. § 603.

³¹ EPA Final Guidance for EPA Rulewriters: Regulatory Flexibility Act, November 2006.

³² Clean Water Act Section 303(d): Preliminary Notice of Total Maximum Daily Load (TMDL) Development for the Chesapeake Bay, 74 Fed. Reg. 47, 792 (Sept. 17, 2009).

³³ Clean Water Act Section 303(d): Notice of the Public Review of the Draft Total Maximum Daily Load (TMDL) for the Chesapeake Bay, 75 Fed. Reg. 57, 776 (Sept. 22, 2010).

rulemaking, courts have not hesitated to consider an agency pronouncement issued without meeting every APA requirement a rule.³⁴

The Code of Federal Regulations at 40 CFR § 130.6 requires the state's water quality management plan ("WQMP") to include TMDLs, economic analysis, "the financial and institutional measures necessary for implementing recommending solutions", and a fiscal analysis regarding stormwater. The Bay TMDL augments the six Bay states and District of Columbia Water Quality Management Plans, yet nothing in the Bay TMDL, or any of its supporting documentation, discusses the financial and institutional measures for achieving the Bay TMDL. As noted above, the impacts will be severe and significant. As such, **NAHB urges EPA to conduct a comprehensive economic assessment and RFA analysis to ensure that the final TMDL is economically workable and affordable.**

2. Impact on The Residential Construction Industry and Housing

The costs of the TMDL will be borne by the construction industry in the form of land, planning, and carrying costs; installation and maintenance of BMPs; and, in affected states that have no pollutant allocation set aside for future growth, the requirement to offset all pollutant loadings from new construction activities. These will ultimately be felt in the market as a combination of higher prices and lower output for the construction industry. As output declines and jobs are lost in the construction industry, other sectors of the economy that buy from or sell to the construction industry will also contract and lose jobs. Builders and developers already are being crippled by the economic downturn and the ability of the home-buying public to absorb significant new costs and the TMDL will further exacerbate these challenges. Further, because compliance costs are incurred prior to the home sales, builders and developers will be required to pay carrying costs, which add additional cost to projects. Because the vast majority of our membership consists of small businesses, even moderate cost increases or variations between regulatory options can have dramatic and significant negative market impacts.

The costs associated with the TMDL will keep thousands of potential home buyers out of the market and is likely to lead to increased unemployment and very hard choices for the limited funds available to the affected states. We also note

³⁴ See Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs, 417 F.3d 1272, 1284 (D.C. Cir. 2005).

that if EPA proceeds with the hiring of an “Independent Evaluator” (though this initiative was completely unaddressed in the proposal) the Evaluator will have the power to punish states for not raising sufficient funds to meet the TMDL’s goals for that state, but the Evaluator will have no responsibility for considering the state’s other needs to ensure that the schools continue to function, police and fire protection are afforded the populace, and that the poor are fed.

This rulemaking also promises significant consequences for commercial builders, contractors, proponents of public infrastructure projects, and virtually any facility operator that is contemplating expansion. There will be serious ramifications and unintended negative consequences for state and local governments responsible for completing their own construction projects, while also overseeing the implementation of the TMDL through the state and local permitting programs.

3. Impact on State and Local Governments

It is uncertain how much of the cost burden will fall on state and local governments, but preliminary estimates suggest compliance costs in the tens of billions of dollars³⁵. In addition, state and local government employee time required to implement the proposed regulation has not yet been estimated credibly by EPA. It is expected that the administrative burden to State and local governments for implementation and enforcement will approach a million hours per year, requiring the equivalent of approximately 500 new full-time staff. This significant new manpower requirement comes at a time when State and local governments are having extreme difficulty in finding funds to continue paying their current staff.

We refer you to the comments of Ms. Penelope A. Gross, submitted on Oct. 14, 2010 to the TMDL docket (comment number 0052):

For most local governments, the most direct impact is MS4 permits, combined stormwater permits where the TMDL may require retrofits, but says nothing about how local governments will pay for them. EPA needs to tell the states that they have an obligation to provide funding if they require major retrofits at the local level. For that matter, EPA says nothing about federal funding to help meet requirements of the TMDL. They do not understand the implications that local governments may,

³⁵Maryland Association of Counties estimate cited in the November 2, 2010 NAHB webinar on “Stormwater Requirements vs. Smart Growth,” see www.nahb.org/stormwaterwebinar.

indeed will, have to raise taxes to meet the requirements, and the issues that raises with local taxpayers.

No matter how laudable the intentions behind the development of the Chesapeake Bay TMDL program, the most certain outcome will be another disappointing program failure if indifference at the federal level to economic and fiscal impacts continues. If concerns relating to costs are not analyzed and addressed at the early stages of this initiative, the entire program will fall under the weight of the economic burdens it will impose upon many local governments and businesses. Furthermore, if we don't have a firm understanding of costs and how the burdens of meeting these costs will be distributed, we don't have a true "partnership."

Ms. Gross is correct. For EPA to blindly propose such extraordinarily expensive, technically risky requirements on the Chesapeake Bay states already near the financial breaking point, EPA again risks total failure of the restoration program.

In another partnership issue, EPA is holding up government agencies as the "leaders" in the new stormwater measures required under the proposal. While these agencies have been subject to stormwater requirements at their facilities that are part of the Energy Independence and Security Act (EISA) since 2007, the TMDL proposal gives those agencies until 2011 to adopt agency policies to begin meeting the EISA provisions.³⁶ The fact that the agencies have not met their EISA requirements for more four years does not suggest leadership. Why have federal facilities not been subject to meeting the EISA requirements? If the federal agencies are to be held up as leaders in the Chesapeake Bay watershed, will their NPDES permits and their NPDES compliance histories be made public?

b. EPA Must Identify Funding Sources.

It is obvious that neither the localities, the states, nor the federal government has billions of dollars available to throw at this proposal. EPA's entire budget should be examined for programs and funds that can be redirected to restoring the Bay. EPA's salary structure should be examined to bring it in line with what the private sector is paying for similar positions, and those freed up funds directed to the Bay. In short, EPA needs to show innovative thinking in raising funds since traditional funding sources are not available.

³⁶ 42 U.S.C. § 17094 (requiring federal development or redevelopment projects that exceed 5,000 square feet to restore or maintain the predevelopment hydrology of the site to the maximum extent technically feasible).

V The TMDL Lacks Sufficient Detail to Allow the Public to Fully Understand Requirements.

The TMDL is just one component of an array of new documents, guidance, WIPs and other state and local actions that will place new requirements on various stakeholders. Unfortunately, the complexity and interrelatedness of these efforts is not always apparent and it is not clear what will need to be done differently to reach compliance.

a. Methods to Comply with the TMDL are Not in the Proposal

Clearly, the TMDL will impose new requirements on communities and landowners, but from reading the proposal, it is not clear what all of those new obligations will be. EPA will allow only “EPA approved” BMPs to be used to meet the pollution reduction requirements under the rule. Other BMPs not approved by EPA’s Goal Implementation Team (GIT) will not be credited for pollutant reductions under the TMDL. For home builders, there are numerous BMPs now being used in the Bay watershed to meet state stormwater permit requirements. EPA has selected a subset of those BMPs, primarily low-impact development (LID) devices we assume, for home builders to use to reduce their nitrogen, phosphorus and sediment discharges. However, EPA has not included in the TMDL package a list of the BMPs that are acceptable to meet the rule. Nor has the agency given a rationale for selecting the subset of BMPs, supplied the performance expectations for the BMPs selected, or supplied data to demonstrate the effectiveness of the BMPs in real world applications. Given the extreme nature of the “backstop allocations” that the agency has applied to the WIPs of five of the Bay states, NAHB is very interested in seeing the supporting data that justifies the backstop standards proposed. **NAHB requests that EPA immediately post to its website the supporting documents for the BMPs that EPA proposes for home builder’s use in stormwater management control programs under the TMDL, and the supporting documents that demonstrate that the “backstop allocations” for urban stormwater programs in the state WIPs are achievable in practice, as well as any cost information supporting EPA’s decisions regarding those BMPs.**

VI The TMDL Fails to Fully Consider All Sources, Inappropriately Targets Construction Activities, and Fails to Address Risks to the Restoration Program.

To meet the overall goals of the Bay’s restoration, the TMDL must address all sources contributing to the Bay’s deterioration, allocations must be proportional to the amount of pollutants each source contributes, and the need for restoration must be balanced with the need for growth. As proposed, however, the TMDL meets none of these goals.

a. Appendix T Does Not Adequately Address the Risks from the Conowingo Dam

The discussion in Appendix T makes some remarkable claims and leaves out some very important parts of the discussion related to Conowingo Dam. Upon Conowingo Dam reaching its sediment holding capacity in 15-20 years (precisely at the end of the Bay TMDL), the sediment and phosphorus loads from the Susquehanna will increase significantly to the Bay: 250% for sediment, 70% for phosphorus, and 2% for nitrogen³⁷. If Conowingo Dam ever reaches capacity near the end of the TMDL, the entire multi-billion dollar investment that the states have made in restoring Chesapeake Bay will be lost forever.

EPA's discussion on page T-5 dismisses this risk by stating that "EPA's intention is to assume the current trapping capacity of the dam will continue through the planning horizon for the TMDL (2025)." The possibility of reaching the dam's capacity during the TMDL is very real, and to address this risk would take another large investment of money. Page T-4 provides an estimate of nearly \$50 million per year to dredge out enough sediment to keep up with their delivery from the Susquehanna River. EPA has not addressed the potential for a large storm with winds from the "right" direction to scour the sediments and send them over the dam. The risk of such a calamity increases each year of the TMDL as the sediment level climbs upward behind the Conowingo Dam. In fact, as EPA washes its hands of all responsibility for the risk of failure that this situation might bring to the TMDL program in Chesapeake Bay, the agency plans to punish the downstream states in a case where "the trapping capacity of the dam is reduced, then EPA would consider adjusting the Pennsylvania, Maryland and New York 2-year milestone loads based on the new delivery loads."

Prior to the effective date for the Bay TMDL, EPA, the U.S. Army Corps of Engineers and the Chesapeake Bay states should jointly hold a public meeting to discuss and seek a solution on this very real risk to the Chesapeake Bay Restoration Program. As EPA is aware, this is not just a money issue or even simply a risk of catastrophic failure of the TMDL. The STAC Workshop in May 2000 on "The Impact of Susquehanna Sediments on the Chesapeake Bay" found that the consequences that will result as sediment nears the lip of the dam include: (1) increased phosphorus in the Middle Bay; (2) an

³⁷ Langland and Hainly, 1997. Changes in Bottom-Surface Elevations in Three Reservoirs on the Lower Susquehanna River, Pennsylvania and Maryland, Following the January 1996 Flood – Implications for Nutrient and Sediment Loads to Chesapeake Bay. U.S. Geological Survey Water Resources Investigations Rept. 97-4138. U.S. Geological Survey, Washington, DC.

increased need for dredging navigation channels in the Upper Bay; (3) higher turbidity and faster sedimentation everywhere in the Bay, but especially in the navigation channels; (4) adverse effects on the recovery of submerged aquatic vegetation; (5) impacts to benthic organisms; and (6) impacts to fish. Without massive amounts of money spent to address the sediment pile up behind the Conowingo Dam, the listed impacts could begin to appear in Chesapeake Bay towards the end of the TMDL (2025), even after the Bay states spending billions of dollars to reduce their pollutant loadings to the Bay.

b. The Contribution of International Airborne Pollutants is Not Considered.

Section 4.7.2 of the proposal fails to acknowledge the contribution of airborne emissions from sources outside the U.S., especially sources in Canada, Mexico, and from uncontrolled fires in Southeast Asia. Research done for EPA's Regional Haze Program highlights how important those sources have become to the U.S. While domestic sources are reducing their emissions through a number of national regulatory programs, foreign sources are often poorly regulated and their impact on the U.S. continues to grow. It is ironic that the Regional Haze Program, which has done much to reduce domestic sources of NO_x, SO_x, particulates, and other airborne pollutants through its Best Available Retrofit Technology initiative, is not mentioned. The Regional Haze Program has done an enormous amount of research on the airborne deposition of pollutants in the U.S. and has generated predictions of future airborne pollutant loads for all U.S. locations including the Chesapeake Bay area.

EPA needs to acknowledge and account for the contribution of foreign sources to the nitrogen loading to the Chesapeake Bay. While these foreign sources are now a minor portion of the airborne loading, before 2025 they may overtake the impact from domestic airborne sources on the Bay's health. EPA needs to tap the research already done by the Regional Haze Program and build on that information. Permit holders in the Chesapeake Bay area should not be unduly penalized under the Chesapeake Bay TMDL by instituting requirements for domestic sources to reduce nitrogen discharges while the deposition of nitrogen originating from uncontrolled airborne sources outside of the U.S. is not evaluated by the agency.

VII The TMDL Does Not Go Far Enough to Ensure Flexibility or Invite Innovation.

Builders and developers strive to provide affordable, quality housing and contribute to thriving communities while embracing and enhancing the natural environment. They regularly plan their projects and take steps to provide a high quality of life by avoiding sensitive resources, minimizing natural disruptions, preserving trees and open space, and reducing overall environmental impacts. As regulations become more and more stringent, builders and developers lose needed flexibility to design and craft innovative solutions to stormwater management during land development. This oftentimes results in inefficient and/or ineffective outcomes. Unfortunately, EPA's proposed rule will have this result. It imposes new regulatory burdens, liabilities and compliance costs on builders and developers yet adds little, if any, demonstrated environmental protection. Furthermore, although the complexity and broad scope of the proposed TMDL demands implementation plans that are sufficiently flexible, invite innovative solutions, and identify and remove impediments to environmentally sensitive development, it treats each of the 92 watershed segments, various pollutant sources, and remedies as one single, mammoth entity, effectively placing inappropriate mandates in some instances and removing opportunities in others. Without sufficient flexibility and innovation, the TMDL should be considered dead on arrival.

a. The TMDL Must Recognize That LID Does Not Work Everywhere.

EPA guidance documents and encouragement for MS4s to require the use of LID to infiltrate, transpire or reuse the rain runoff from construction sites in the NPDES permits issued by the MS4s, leads NAHB to construe that EPA will insist that only LID BMPs will be acceptable to meet the TMDL for all construction activities. As NAHB has said many times, LID does not work everywhere in the Chesapeake Bay watershed. Early users of LID have experienced the difficulties and limitations associated with the practice, but EPA seems determined to make many of the same mistakes already made by others. We provide the simple but eloquent testimony of Cathy Drzyzgula, Council Member of the City of Gaithersburg, Md., who testified on behalf of the Metropolitan Washington Council of Governments (Washington COG) at the Sept. 22, 2008 House Hearing on the Reauthorization of the Chesapeake Bay Program:

Regulation should encourage the use of environmental site design and low-impact development techniques--as is now being done in Maryland, Virginia and the District of Columbia--but it should not prescribe that only these techniques are used. It is important to note that developers and localities are only starting to implement ESD/LID practices on a large-scale basis. The jury is still out on a number of issues regarding their

performance, such as the relationship between maintenance and long-term performance efficiency. Local governments are concerned about the challenges of administering inspection and maintenance programs for practices that will be widely distributed throughout the urban landscape and that may be located on individual residential lots. It is also important to note that based on the experience of Washington Council of Government's stormwater program managers to date, such practices are not necessarily cheaper to install than more conventional stormwater management technology.

Baseline performance requirements for urban stormwater control should make a distinction between new development and redevelopment sites, and any redevelopment requirements should be balanced by the critical need to encourage infill development and Smart Growth. In addition, baseline performance standards should include an allowance for offsets or other measures that would permit certain projects to go forward that cannot meet all of the runoff standards on site. This is particularly important for redevelopment sites, which typically face many more constraints than new development sites. To be truly effective, offset provisions and trading programs must be crafted at the state-local level and allow flexibility in implementation. This is not a provision that an overall federal standard should seek to detail.

NAHB concurs.

NAHB further notes that the Chesapeake Bay Program has developed a "Protocol for the Development, Review, and Approval of Loading and Effectiveness Estimates for Nutrient and Sediment Controls in the Chesapeake Bay Watershed Model", dated Oct. 14, 2010. Because this document was so recently published, **it is not clear whether EPA's "approved" infiltration BMPs were approved after following this protocol, or whether EPA is planning a future analysis for infiltration BMPs or other LID BMPs using this protocol.** The selection and implementation of BMPs on new construction and redevelopment projects is of keen interest to NAHB and its members. The Chesapeake Bay Program has not consulted with home builders or the construction industry on the benefits and limitations associated with using LID, nor has EPA shared data to support broad-scale mandates for the use of LID throughout the Chesapeake Bay region. **NAHB strongly urges EPA to meet with home builders and other members of the**

development community to discuss the benefits and limitations of LID used for stormwater management.

b. Urban Retrofits Requirements Could Conflict with Smart Growth.

The Jan. 15, 2010 meeting of Maryland's Department of Planning "Task Force on the Future for Growth and Development" serves as a reminder that strong stormwater requirements on redevelopment projects in urban areas can chase away urban redevelopment unless alternatives for stormwater compliance are readily available.³⁸ After hearing from several Maryland communities and several developers and builders, the state revised its aggressive program to provide some alternatives for compliance for projects in urban areas where space constraints, polluted soils, and other drawbacks make stormwater management more problematic and costly than similar projects outside of the urban areas.

EPA and the states need to proceed with caution to ensure that new, stringent stormwater goals are not in conflict with the Smart Growth concept of incentivizing redevelopment of our cities over building in the remaining green areas of the watershed. That means that alternatives for compliance with stormwater standards are needed for urban projects. In addition, programs for both stormwater and Smart Growth must be reevaluated periodically to ensure that the programs are not in conflict. Further, of the states must periodically assess the effect of new stormwater requirements on the cost of housing.

c. Water Quality Trading and Other Flexibility and Cost-Effectiveness Provisions Are Critical to the TMDL's Success.

The stormwater pollutant reductions that will be mandated under the TMDL for new development, redevelopment, and the retrofit of existing impervious pavements in cities and towns will not be achievable without a robust trading program and adequate off-site mitigation alternatives. This is due to both the technical challenges posed by the urban setting and the cost of retrofits. Likewise, communities that wish to add jobs and grow will depend on the existence of new growth to purchase offset credits prior to construction. Further, without trading, agricultural entities, for the most part, will be unable to make sufficient pollutant reductions necessary to restore the Bay due to the sheer costs they will be asked to bear. Without a major contribution from agriculture that is proportional to agriculture's contribution to the impairment of the Bay, the Bay restoration goals will be unattainable.

³⁸ A summary of the meeting and presentations made is available at <http://planning.maryland.gov/YourPart/773/773Meetings.shtml>.

Though EPA has endorsed the concept of water quality credit trading and has an active technical committee, the Water Quality Trading Forum, that examines the concept, nothing visible has been done to put pen to paper to actually move towards developing a robust, interstate water quality credit trading program made necessary by the proposed TMDL. This will prove extremely problematic as the program is implemented. Maryland, for example, has not allocated any loadings for future growth in its WIP and expects that, beginning next year, all future construction will be offset through the purchase of water quality credits. The state, however, has no functioning program for trading between point sources and nonpoint sources or for trading between nonpoint sources. Likewise, EPA has itself not proposed a Chesapeake Bay-scale trading program.

A viable and fair trading program must be in place as soon as possible. NAHB submits that EPA is in an ideal place to do much more to help states bring this about. The agency is the only entity that has had full knowledge of the necessity for a large, broad-based trading program that would allow NPDES permit-holders to purchase credits from the low-cost agricultural BMPs that will be necessary to fund if the construction industry is to survive in the Bay watershed. To date, the agency has done nothing but publish papers on the many provisions that others must meet to put together a trading program. **To further assist in the development of water quality trading, the Chesapeake Bay Program should be working with the EPA's HQ permits section to provide appropriate trading language for incorporation into NPDES permits, identifying the elements necessary for an acceptable trading program, and working to find an entity capable of overseeing the generation and selling of water quality credits.** Home builders normally have short-duration permits of nine months to a year, adding another complication to their participation. However, without trading, there will certainly be further job losses in the housing industry during the beginning of the restoration program.

NAHB can find no language in the proposal that indicates when the purchase of offset credits comes into effect for new dischargers. While the TMDL is to be "finalized" at the end of 2010, does EPA really intend that offsets for new dischargers must take place for new construction permits as of Jan. 1, 2011? How are the pollutant loadings from construction projects to be determined? What are the loadings that EPA expects to result from the construction of a new home, and what data has led EPA to its estimate of pollutant loadings from home building?

NAHB has several outstanding concerns regarding the proposed use of water quality trading in the Chesapeake Bay watershed:

- We fear that the state trading programs may be reluctant to sell credits to private businesses to allow the state to retain a supply of credits to offset the new discharges from road building, construction activities, or other operations.
- The vast majority of home builders have NPDES permits that are required for nine months to a year, the time needed to build a single home. Their businesses may be disadvantaged in trading programs which are designed for use with industrial or MS4 permits, which normally span at least five years.
- It strains belief to think that every new NPDES discharger in the entire 64,000-square-mile watershed will be able to acquire the credits that they need to do business in 2011 when no state has anything approaching such a program now. The potential economic consequences of this requirement could be devastating to the region's economy. **Without readily available, affordable, and adequate water quality trading options for businesses in the watershed, EPA must delay the effective date of the TMDL.**

EPA should also consider the developing Ohio River Basin Trading Project as a possible model for trading in the Chesapeake Bay watershed.³⁹ The Ohio River Basin project trades both nitrogen and phosphorus and should at least provide “lessons learned” for those working to bring trading to the Bay. **We also strongly encourage the Chesapeake Bay Program Office to consider sediment trading as well as nutrient trading for the same.**

d. Comments on Appendix S. Offsetting New or Increased Loadings of Nitrogen, Phosphorus and Sediment to the Chesapeake Bay Watershed.

- i. Page S-2, section II, 3, *Offsets Baseline* – Farmers have made it clear that if they must meet the TMDL baseline, it disadvantages those farms that have voluntarily installed BMPs to improve water quality. In addition, they say that once they meet the TMDL baseline requirements, they will have used most all of the

³⁹ See <http://mydocs.epri.com/docs/public/000000000001019305.pdf>.

inexpensive measures to improve water quality, and further measures will increase the cost of their credits to be sold. **EPA should allow credit for farms towards meeting the TMDL baseline from existing BMPs on the farm that were installed prior to the TMDL. Further, farmers should be allowed to sell credits prior to meeting the baseline if they show a credible plan to achieve and verify meeting the TMDL baseline after selling credits.** Without such flexibility provisions, the generation of credits for sale from agricultural operations will be constrained.

- ii. Page S-2, Section III.1., Authority – Since the federal Construction General Permit will be revised in 2011, EPA should consider supplying language for inclusion in the new permit that endorses the concept of water quality credit trading to encourage states to consider trading to lower their costs of water quality improvement measures.
- iii. Page S-3, Section 2.(b), Offsets Baseline (for credit generators) – this section contains the term “geographic scale.” Does this term refer to the geographic region where the credits from a source can be bought?
- iv. Page S-4, 7.(b) – This section discusses estimating the pollutant loading from nonpoint sources and discharges from unpermitted sources. **This estimate must account for the airborne deposition of NO_x from the emissions from Southeast Asia, Mexico, Canada, and other foreign nations.** NO_x deposited into the Chesapeake Bay watershed from sources outside the scope of the TMDL will continue to increase for the foreseeable future. Domestic permitted sources must not be penalized by being forced under the TMDL to make additional pollutant reductions to account for the actions of offshore, unregulated air emissions that deposit NO_x into the Chesapeake Bay watershed.
- v. Page S-4, 7.(c) – Given the economic situation of the states, the additional burden on the states on the new TMDL requirements, and the existing permit backlogs in the states, it is not practical, and certainly not a good

use of rare resources, to reopen state permits to incorporate offset transactions. The overhead costs of any trading program will increase the price of credits, shutting some sources out of the credit market simply because they will not be able to afford the credits or the credits are unavailable at any price. There is no environmental value gained by adding offset transactions to permits when such information will be found on the website of the entity responsible for selling trading credits. **Adding to the trading program's overhead cost by requiring permits to incorporate the offset transaction is a bad idea.**

- vi. Page S-5, 8(c) – Home builders will be disadvantaged if the offset or credit purchased cannot be sold again during the term of the credit. As we understand it, credits are normally of multi-year duration, perhaps 3–5 years, much longer than required for the majority of homebuilders, who need only nine months to build a home. **At a minimum, EPA should consider adding a provision for those with short-duration permits providing that, at the termination of their NPDES permit, they can sell the remainder of their credits to another source.**

e. Decentralized Wastewater Systems Must be an Acceptable Alternative for Septic Systems.

Page 4-39, Section 4.7.4 describes On-site Wastewater Treatment Systems (OSWTSS) and their contribution of nutrients to the Bay. Many of the states have initiated requirements for the use of denitrification on-site systems for all new and old, failing OSWTSS. Such systems are expensive, about \$12,000 or more per system, and simply unaffordable to many. Public funds have assisted in the implementation of such systems, but ultimately the cost to retrofit all OSWTSS will not be affordable.

NAHB understands that decentralized wastewater systems, sometimes referred to as “cluster septic systems,” are not on the “EPA-approved” list of BMPs for the Chesapeake Bay TMDL. It is not certain why this is so, but NAHB submits that because decentralized wastewater systems can be an effective option for

protecting public health and the environment if properly designed, installed, and managed.

For new homes, individually designed, collective, decentralized sewer systems hold promise to lower costs, increase pollutant reductions, save vast amounts of land that otherwise would have to be devoted to individual drain fields, and allow developers to cluster housing and provide protection to natural features and systems. Indeed, EPA's own Office of Water Program Strategy for Decentralized Wastewater Systems recognizes that effective implementation of these systems can protect public health and the environment.⁴⁰ As such, there is no reason why states should not be allowed to take advantage of the potential for these systems' lower costs and better environmental outcomes.

VIII EPA Should Not Use the Chesapeake Bay Program or The TMDL as a National Model.

EPA has repeatedly claimed that the Chesapeake Bay TMDL will be used as a model for other nutrient reduction programs across the U.S. Because of the breadth, peculiarities, and cost of this effort, however, this TMDL would make a poor choice for replication and, thus, should not set the bar for future efforts.

The Chesapeake Bay Strategy issued as a result of the Chesapeake Bay Executive Order reveals how complicated the restoration program, in its totality, will be. The program will not only be complicated, but it will be costly in the extreme, with many never-before-used regulatory provisions that will likely need revision. Nowhere else will such a program take place in the future because no one else will be able to afford it. It remains to be seen whether the Chesapeake Bay states can afford it. The existing Chesapeake Bay Program has come about because of the millions of dollars that the federal government has spent since the 1980s to monitor, research, and model the Bay using state-of-the-art software. It is doubtful that the federal government will continue to send dollars to the Bay states to restore the Chesapeake Bay. The Chesapeake Bay Program should be held out to future states that must reduce nutrients in impaired waters for its "lessons learned" experiences, not for its program content which was developed for a unique situation that will not be duplicated.

Thank you for your consideration of this our comments and suggestions. Please feel free to contact me at 202-266-8662 or grountree@nahb.org if you have any questions.

⁴⁰ See http://www.epa.gov/OW-OWM.html/septic/pubs/septic_program_strategy.pdf.

Cordially,

A handwritten signature in dark ink, appearing to read "G. Glynn Rountree", with a horizontal line extending from the end of the signature.

Glynn Rountree
Environmental Policy Analyst

Enclosure: Attachment A

National Association of Home Builders

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NAHB Advocacy Group



Attachment A

October 15, 2010

Jennifer Sincock
U.S. Environmental Protection Agency
Region 3, Water Protection Division (3WP30)
1650 Arch Street
Philadelphia, PA 19103

**Re: Docket ID No. EPA-R03-OW-2010-0736
Request for an extension of the public comment period for the proposed
Chesapeake Bay TMDL**

Dear Ms. Sincock:

On behalf of the National Association of Homebuilders (NAHB), I respectfully request that the U.S. Environmental Protection Agency (EPA) extend the public comment period for the Draft Total Maximum Daily Load (TMDL) for the Chesapeake Bay, the availability of which was announced in the Federal Register on September 22, 2010, for an additional 180 days. This additional time is needed because of the technical complexity of the proposal and the need to afford all impacted parties an opportunity to fully understand and provide meaningful comments. It is also needed so that EPA can make all of the supporting documents available for review.

NAHB is a trade association representing more than 175,000 members involved in home building, remodeling, multifamily construction, property management, subcontracting, design, housing finance, building product manufacturing and other aspects of residential and light commercial construction. Known as "the voice of the housing industry," NAHB is affiliated with over 800 state and local home builders associations around the country. NAHB's builder members will construct about 80 percent of the new housing projected for 2010. Because of the nature of their work, most of our members must obtain and operate pursuant to National Pollutant Discharge Elimination System (NPDES) permits for controlling the stormwater discharges stemming from their construction activities. The Chesapeake Bay TMDL's requirements will become a part of the stormwater permits issued for homebuilding projects in the Bay watershed.

The Chesapeake Bay TMDL is a very complex, innovative and far-reaching new rule. Because of the impact the TMDL will have on the home building industry, communities, and the overall region, it is imperative that it be finalized only after all parties are provided sufficient opportunity to give careful thought and consideration to all aspects of the proposal and its supporting documents. EPA's efforts to accelerate the TMDL's completion by cutting a most important element in the development of the Bay restoration program – the public review and comment period – is misguided and wrong. Contrary to this approach, the Agency is strongly urged to provide the public more, not less time. NAHB believes that EPA should extend the comment period for a minimum of 180 additional days.

A Complex Proposal Demands Sufficient Review

EPA acknowledges that the Chesapeake Bay TMDL will be the largest, most complex TMDL in the country, and it will be held up to the nation as the bar to meet for the future nutrient reduction programs that will take place around the U.S.; yet EPA is, at the same time, proposing to short shrift the public by limiting its ability to study the proposal and offer comment. Indeed, EPA has asked the public to review and comment on the lengthy proposal and supporting documentation including state Watershed Implementation Plans, a highly-technical pollutant reduction model, land use assumptions, and 22 appendices. Appendix B alone includes a list of documents supporting the Chesapeake Bay TMDL that spans 16 pages – all of which should be analyzed and understood before making comment. Taken together, the sheer volume of information amounts to thousands of pages that cannot realistically be reviewed and analyzed within the given 45-day comment period. Moreover, because the proposal raises many legal and policy issues, careful consideration and research will be needed before suggested solutions can be drafted.

While the Administrative Procedure Act (APA) does not specify a minimum time period for comment on a proposed rule, Executive Order (EO) No. 12866 provides that most rulemakings “should include a comment period of not less than 60 days.”⁴¹ Likewise, for most TMDLs, EPA and the states provide a minimum of 60-90 days for public input. For example, EPA recently provided a public comment period of 60 days for the Accotink Creek TMDL in Virginia in the summer of 2010. Accotink Creek represents only one TMDL, vs. the 94 segments, or individual TMDLs, that make up the overall Chesapeake Bay TMDL. Following this example, it would be plausible that the Agency provide a 5,640 day comment period for the Chesapeake Bay TMDL (60 days per TMDL x 94 segments). NAHB is merely asking for additional 180 days.

Furthermore, when the Agency has offered insufficient time to review similarly complex and expansive rulemakings, EPA has recognized the mistake, extended the comment period, and issued the complex rulemaking after due time for consideration. For

⁴¹ Exec. Order 12866, 58 Fed. Reg. 51735 (September 30, 1993).

example, EPA proposed 80 TMDLs in Louisiana and originally offered the public only 30 days for review and comment.⁴² Not surprisingly, EPA received several requests to extend the comment period, so EPA agreed to accept comments for an additional 60 days.⁴³ After reviewing comment from stakeholders who had additional time to review the data, EPA finalized the 80 TMDLs 7 months later.⁴⁴

Finally, because EPA has plainly stated that the Chesapeake Bay TMDL will be used as a model for other waterbodies across the country, it is all the more important that the TMDL be accurate and fully vetted. A TMDL that cannot meet its intended goals serves no one. Allowing sufficient opportunity for the public to participate in forming the rule and providing input on the actions that can be taken to meet the goals will better ensure that the TMDL is not only practical and effective, but that it will be properly implemented.

The Technical Data and Cost Information Are Not Readily Available

In addition to proposing a TMDL that is highly complex and confusing, EPA has not made all of the supporting documentation available for review. As a result, it is impossible for the public to fully understand the Agency's reasoning or follow its justifications. For example, EPA has provided no technical data to justify the need for the urban stormwater requirements contained in the backstop allocations or to demonstrate that they will meet the desired outcomes. Likewise, information on costs or the best management practices that can be used to meet the urban stormwater requirements have not been made available. Other technical and cost data is similarly absent from the docket, as is any way to quickly understand how the proposal will affect the various industries, communities, or individuals within the watershed. If the public does not have access to these baseline datasets, it is unable to provide meaningful comment. Similarly, if the public cannot understand how the proposal will affect their interests or businesses, their ability to provide useful input is significantly hindered. EPA is obligated to make all supporting information and documents available to the public prior to the start of the public comment period and to provide sufficient opportunities for its thorough review. The existing docket and schedule fails to do so.

The Breadth of Impacts Warrants Broad Opportunities for Participation

The Bay TMDL will impose additional, extraordinarily difficult regulatory requirements on the home building industry and the citizens and communities located around the Bay. As such, it is imperative that the TMDL get a thorough examination not just by home builders, but by all stakeholders. Not only will a 45 day review period fail to provide sufficient time for the public to conduct a meaningful review or the develop insightful comments that would result from that review, for most stakeholders, the publication of the proposal is the first glimpse they have gotten into the sweeping breadth of the rule,

⁴² 71 Fed. Reg. 41217 (July 20, 2006) (setting August 21, 2006 as the original deadline for public comment).

⁴³ 71 Fed. Reg. 59504 (Oct. 10, 2006) (agreeing to accept public comment until October 20, 2006, review the comments, and revise or modify the TMDLs as appropriate).

⁴⁴ 72 Fed. Reg. 19,703 (Apr. 19, 2007).

the assumptions that EPA has made concerning their industries, and the many details that may affect their particular businesses and/or properties located within the Bay's watershed.

Unlike other similar efforts, EPA has failed to include the public or the affected parties in developing the TMDL. While the Agency has held numerous meetings on the effort (outlined in Appendix V), very few have been targeted to those industries or stakeholders who will be impacted. For example, NAHB has been monitoring and participating in EPA's activities since 2009 (the overall regulatory effort began in 2008) and that was only after NAHB conducted significant due diligence and convinced the Agency to allow us to participate. In the technical meetings that NAHB has attended leading up to the proposal and on the technical conference calls in which we have listened in; we cannot recall a single representative of another industry at any of those meetings or on any of the calls. This represents a significant flaw in the Agency's process.

As a result of this failure to communicate or allow broad participation, the vast majority of industrial sectors that will be impacted by the TMDL have only just become aware of the coming rule and the potential severity of its requirements. The public meetings that EPA is currently holding may help in this regard, but many stakeholders will need more than the allotted 45 day comment period to fully understand the proposal and provide adequate technical comments on the draft rule. Indeed, EPA states that the goal of these meetings is "to assist the public in their understanding of the Draft Bay TMDL and provide an overview of the TMDL process, *especially the stakeholder review and comment process.*"⁴⁵ For stakeholders in Romney, West Virginia who are hoping to use their November 4 public meeting as an opportunity to be introduced to EPA's effort, their public comment period has effectively been reduced to 4 days (two if one only counts business days).

Only people who work in the affected industries can possibly know in full how the proposed rule will impact their operations and how their portion(s) of the rule will work in the real world. Therefore, their review and comment is absolutely necessary to fine tune the requirements and ensure the proper balance between environmental stewardship and the economic impacts is made. In order to ensure that these entities can make their voices heard, EPA must extend the comment period.

EPA Retains Authority to Revise the Timeline/Allow a Longer Comment Period

EPA continually points to the TMDL schedule included in its May 2010 settlement with former Maryland state senator C. Bernard Fowler, the Chesapeake Bay Foundation, Maryland and Virginia watermen's associations, and others in *Fowler v. EPA* that calls for the completion of the Bay TMDL by December 31, 2010 as the reason for a truncated public review. The Agency, however, has full authority to revise the schedule and timeline to allow for a sufficient comment period. Indeed, because the current deadline is

⁴⁵ 75 Fed. Reg. 5776 (September 22, 2010) (emphasis added).

simply an agreed-to date within a court settlement, EPA can renegotiate.⁴⁶ In fact, the Settlement Agreement gives EPA flexibility to extend the December 31 deadline and certainly does not limit or modify EPA's discretion to allow the public sufficient time to review and comment on the 94 Bay TMDLs.⁴⁷ Because the very purpose of the public comment process is to allow stakeholders to analyze the proposal and provide comments and suggestions that may improve the effectiveness and lower the costs of the rule, providing additional time for this vital and necessary input provides benefits to both the Agency and the public.

It is only fair that the public be given ample time and opportunity to participate in the development and finalization of this important and sweeping proposal. The Chinese saying: "Find enlightenment through heeding many points of view. Find ignorance through heeding few" is one EPA should follow. EPA needs to give stakeholders the broadest opportunity possible for them to fully understand and make their suggestions on the proposed rule. The best way to do that is to provide a minimum of 180 additional days for the public comment period for the proposed Bay TMDL.

Thank you for your consideration of this request. Please feel free to contact me at 202-266-8662 or grountree@nahb.org.

Cordially,

A handwritten signature in dark ink, appearing to read "Glynn Rountree", with a stylized flourish at the end.

Glynn Rountree
Environmental Policy Analyst

⁴⁶ *Fowler v. EPA Settlement Agreement*, Section IV.A. ("[t]he parties may modify any deadline or other term of this agreement in writing.").

⁴⁷ *Fowler v. EPA Settlement Agreement*, Sections VI.A, D, & E. (noting that the agreement does not limit or modify EPA's discretion under the APA or require EPA to violate the APA, and allowing EPA to delay deadlines under certain circumstances upon notice to the plaintiffs).